NO.

298

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IN THE

Supreme Court of the United States

October Term, 1957

No. 298

ERIC G. KAUFMAN, et al.,

Petitioners,

v.

HERBERT BROWNELL, JR., Attorney General of the United States, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Eric G. Kaufman, et al., as nonenemy stockholders of Interhandel,[1] pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on June 20, 1957 affirming orders of the District Court denying petitioners' motion for an injunction against the Attorney General to restrain him from selling, prior to the entry of a final judgment herein, 75% of Interhandel's vested assets, which are the subject matter of this suit.

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[1] The full name of the company, which is a Swiss corporation, is Societe Internationale pour Participations Industrielles et Commerciales, S.A. It is also sometimes referred to as "I. G. Chemie."

Opinions Below

The opinion of the District Court of March 13, 1957 (R. 263-5) is unreported. It is printed as Appendix B to this petition. The opinion of the Court of Appeals (R. 278-283) is not yet reported. It is printed as Appendix C to this petition.

Jurisdiction

The judgment of the Court of Appeals with respect to which the writ of certiorari is sought was entered on June 20, 1957 (R. 284). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

Question Presented

Is the decision of the Court of Appeals in conflict with the 1952 holding of this Court in this case (*Kaufman* v. *Societe Internationale, etc.*, 343 U. S. 156)?

Statutes Involved

The pertinent statutory provisions are printed in Appendix A to this petition.

Statement

Plaintiff, Interhandel, filed suit in 1948 under Section 9(a) of the Trading With The Enemy Act, 50 U. S. C. App. §9(a), against the Alien Property Custodian for the return of almost all of the stock of its American subsidiary, General Aniline & Film Corporation, now valued at more than

$100,000,000 (R. 204), which had been previously vested by the Custodian. *Kaufman* v. *Societe Internationale, etc.*, 343 U. S. 156, 157. The Custodian answered that Interhandel was dominated and controlled by officers, agents, and stockholders who were engaged in a conspiracy with German nationals and with the German Government to operate the company's business in their interests during World War II, and, therefore, that the company was either an enemy or enemy-tainted. 343 U. S. at pp. 157-8.

In March of 1950, while this original suit was pending and as yet untried, Eric G. Kaufman and his wife, nonenemy stockholders of Interhandel, on behalf of themselves and all other stockholders of the plaintiff corporation similarly situated, sought to intervene in that suit. Their complaint alleged that it was Interhandel's corporate duty to assert not only a claim for full recovery of the vested assets but also an alternative claim for the return of a portion of the vested assets proportionate to the nonenemy stockholdings in the corporation even though other stockholders who dominate the company may be found to be enemies. 343 U. S. at p. 160. The complaint further alleged that the corporate management refused to assert such a claim and, therefore, that petitioners had a right to intervene to assert this corporate claim derivatively (R. 2-14). 343 U. S. at pp. 158, 160.

The District Court denied the motion to intervene, 90 F. Supp. 1011, and the Court of Appeals affirmed, 88 U. S. App. D. C. 296, 188 F. 2d 1017. The Court of Appeals recognized that petitioners were asserting a corporate claim, but denied intervention on the ground that there was no such corporate right of partial recovery, saying "a corporation has 'no "standing vicariously"' to assert the interest of its shareholders". 188 F. 2d at p. 1018.

This Court reversed, holding that if a neutral corporation should be found to have been enemy-tainted, it was nevertheless entitled to assert and enforce a corporate right to a partial recovery "not for the benefit of all stockholders but only for those who are nonenemies" (343 U. S. at p. 161), and that, because of the refusal of the corporation to assert this claim, petitioners were entitled to intervene as of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure to file the amended complaint they had presented and to prosecute such claim. 343 U. S. at p. 162.

On remand, petitioners were given leave to intervene and filed their amended complaint in intervention. This complaint is still pending and awaiting trial. The original suit by Interhandel for return of all the vested assets has since been dismissed for failure to comply with a pre-trial discovery order. See *Societe Internationale, etc.*, v. *Brownell*, 96 U. S. App. D. C. 232, 225 F. 2d 532, *cert. denied* 350 U. S. 937.

During the course of pre-trial proceedings, and while the original suit for full recovery was still pending, the Special Master who had been appointed to hear the case entered a so-called "bar date" order on July 21, 1953. This order, as approved by the District Court, required all "stockholders in the plaintiff, who intend to intervene herein, or to join in, or to benefit from, one of said complaints in intervention", to file their appearances on or before March 31, 1954 or be forever barred from any benefit from any complaint already filed or thereafter to be filed as well as from any judgment entered respecting the rights or interests of Interhandel's nonenemy stockholders (R. 116-124).

Following the entry of the bar date order, a number of stockholders filed their appearances in the action, but a great many did not. The original suit of the corporation was then still before the court and had not been disposed of. At the time of the hearing in the District Court, there were on file appearances of stockholders owning 41,683 shares of Interhandel common stock. With one minor exception, all of these stockholders have joined either the Kaufman or another intervention.[2]

It having appeared from answers to interrogatories that most of these stockholders had acquired their stock subsequent to the vesting of Interhandel's assets,[3] the Government moved for summary judgment against them on the ground that their rights were barred by the Anti-Assignment Act. 31 U. S. C. 203. The Government argued that there was no corporate cause of action for partial return but only the separate claim of each individual stockholder; that such claims arose immediately upon the vesting; and that subsequent purchasers of the stock were transferees of such claims against the United States and therefore precluded from recovery by the statute. The Special Master on June 18, 1955 (R. 149-159) denied the Government's motion on the ground that the cause of action sustained by this Court in the *Kaufman* decision, 343 U. S. 156, was a derivative claim for corporate recovery; that since such claim had never been assigned the Anti-Assignment Act was inapplicable. In a carefully considered opinion, the Special Master concluded that this Court's opinion in *Kaufman* "shows on its face that it was dealing with a

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[2] Leave to intervene had been granted to Ernest Attenhofer, et al. (also appellants below) and to Annamarie Ruth Klingler, et al.

[3] The stock of Interhandel has been extensively traded on stock exchanges abroad. (*Kaufman* v. *Societe Internationale, etc.*, October Term, 1952, No. 172, R. 71; petitioner's brief p. 9, n. 10.)

derivative stockholder's suit" (R. 151). The decision of the Special Master was confirmed by the District Court (R. 161-2).

In September of 1956, the Government proposed to bring about a recapitalization of General Aniline & Film Corporation which would have changed certain rights and characteristics of its stock. It was further announced that the Attorney General was proposing to sell some of the vested GAF stock after the plan was put into effect.

Upon the motions of the intervenors, the District Court enjoined such proposed recapitalization. *Societe Internationale, etc.* v. *Brownell*, 145 F. Supp. 494. Referring to the duty of the Custodian under Section 9(a) of the Trading With The Enemy Act to retain vested property until final judgment is entered or suit is otherwise terminated, the Court held that this included the duty to preserve the integrity of the vested property and that "under the proposed plan the vested property would not be retained nor would its integrity be preserved as required" (R. 181). This decision was rendered on October 10, 1956.

On February 21, 1957, the Custodian announced his intention to sell 75% of the vested General Aniline & Film stock. Petitioners and the other intervenors immediately moved for injunctive relief under Section 9(a) of the Trading With The Enemy Act. Section 9(a) provides that once suit is instituted to recover an interest in vested property, the Custodian shall retain the property in his custody until "final judgment in favor of the claimant shall be fully satisfied" or until the suit is otherwise terminated. Petitioners pointed out that their complaint in intervention set forth a claim for corporate recovery based

upon the total nonenemy stock interest in Interhandel; that this would far exceed the 25% which the Custodian proposed to withhold from sale; that there had been no final judgment in the action nor even a hearing as to the extent of the nonenemy interest in Interhandel; and therefore that a sale of the vested assets at this time would be premature and in contravention of Section 9(a).

The Custodian argued that all stockholders who had not intervened in the action by March 31, 1954 were barred from recovery by the bar date order; that only 41,683 shares of stock were represented in the action by reason of appearances prior to such bar date, and that retention of the 25% of the vested stock would protect the rights of the holders of those shares.

Decisions of the Courts Below

The District Court denied the injunction, holding that under the bar date order no stockholders other than those who had intervened are permitted to receive any benefit from any judgment; that the intervenors' rights were limited by this Court's decision in the *Kaufman* case to an interest in the assets proportionate to their stockholdings; and that such interest is secured by the 25% of the stock excluded from sale (App. B, p. 30).

The Court of Appeals affirmed but seemingly on a different theory from that of the District Court. It construed this Court's holding in *Kaufman* as follows:

> "to us the Court is speaking clearly, succinctly and positively. To avoid multiplicity of actions by thousands of individual shareholders, a corporate action may be brought as one had been brought. In

that action an individual stockholder might intervene, and on the basis of his own entitlement, his individual right might be asserted'' (App. C, p. 36).

It then said:

> "Section 9(a) of the Act provides that when the court in an equity action finds an individual claimant's interest has been established, it shall order the 'payment, conveyance, transfer, assignment, or delivery . . . of the money or other property . . . or the interest therein to which the court shall determine said claim is entitled;' not the property or interest therein of some *other* claimant, or even of all claimants similarly situated, but of that to which '*said claimant*' is entitled, as established in the suit he instituted. '[S]uch money or property' commanded to be retained pending final judgment or decree can only be that to which claim is made by the claimant authorized by §9 to institute the action reflecting his own 'severable' right.''

The Court of Appeals concluded:

> "It follows that the intervenors here were not entitled to enjoin the sale of assets aggregating in value some $100,000,000 pending ascertainment (1) of their right and (2) the extent of their respective interests following the establishment of their severable rights.''

The Court of Appeals did not reach the questions of the validity and interlocutory character of the bar date order, and whether the order could satisfy the requirement of Section 9(a) that there be finality of judgment before sale, points which were extensively argued below.

Reasons for Granting the Writ

The decision of the Court of Appeals so conflicts with this Court's decision respecting the mode of protection of innocent stockholders' interests, as to produce a result opposite not only to what this Court held, but also to what it intended to accomplish by its holding.

After this Court's decision in *Clark* v. *Uebersee Finanz-Korporation,* 332 U. S. 480, 489 (1947), the petition for certiorari in the *Kaufman* case presented to this Court the question which there had been left open for "legislative or judicial clarification":

> "what part of the assets of a corporation organized under the laws of a neutral country may the Custodian retain where part of the corporate stock is owned by enemies, part by American citizens and part by non-enemy aliens?" *Kaufman* v. *Societe Internationale, etc.,* 343 U. S. 156, 158.

That question was answered not only with the substantive ruling that:

> "when the Government seizes assets of a corporation organized under the laws of a neutral country, the rights of innocent stockholders to an interest in the assets proportionate to their stockholdings must be fully protected" (pp. 159-160);

but with a decision as to the procedure by which those rights would be protected. This Court had construed the 1941 amendment to Section 5(b) of the Trading With The Enemy Act to enable the Government to seize the assets of neutral corporations in order to reach the enemy inter-

est therein. This Court having decided at the same time that Congress had not intended thereby to work a forfeiture of nonenemy stockholders' interests, a method best suited to their protection had to be adopted.

Two methods were proposed:

> Your petitioners proposed that a corporate claim be allowed, proportionate to the nonenemy interest in the seized assets, for the benefit of its nonenemy stockholders.
>
> The Government and *Interhandel* proposed instead, that if any right existed at all, there be permitted only separate claims by individual stockholders, each in his own behalf, for his pro-rata share of seized corporate assets.

This Court concluded that its substantive ruling would be best effectuated by means of a corporate derivative claim, as alleged by the *Kaufmans,* which this Court directed might be filed as of right under Rule 24(a)(2), not under Rule 24(a)(3) and not under Rule 24(b). The allegations of the petitioners' complaint in intervention were pointedly summarized in the opinion, as follows:

> "Alleging that they and others are nonenemy stockholders, petitioners charge that it is *Interhandel's corporate duty* to assert a claim for the return of their proportionate interest in the assets even though other stockholders who dominate the corporation are found to be enemies. Petitioners further allege that the corporate management refuses to assert such a claim, but continues to claim only a return of all assets on the theory that what-

> ever return is obtained must be divided among enemy and nonenemy shareholders in proportion to their stock holdings. This position is taken, petitioners charge, because the suit is being controlled by the very stockholders on whose account the Custodian seized the property and whose interest will be worthless if they are found to be enemies." (Emphasis supplied.)

Interhandel having refused to assert a corporate claim, this Court accordingly granted petitioners, on behalf of all nonenemy stockholders, leave to file this corporate derivative claim for the return of the nonenemy proportion of the seized assets, stating:

> "In view of our holding that Congress has recognized that nonenemy stockholders of nonenemy foreign corporations have a severable interest in corporate assets seized by the Custodian, it follows that the allegations of these petitioners entitle them to intervene. *These allegations,* if true, show that petitioners' interests may be inadequately represented and that they may be bound by a judgment in this corporate action. This brings the claim of intervention *squarely within* Rule 24(a)(2) of the Federal Rules of Civil Procedure." (Emphasis supplied.)

Noting the Government's contention that the rights sought to be protected were individual:

> "And it is argued that if nonenemy stockholders are to be given a chance in court (which right is challenged), they should be limited to individual suits for money judgments against the Custodian.",

this Court rejected it:

> "But we think the questions involved in disputes like this can be more appropriately resolved in the corporate actions authorized by §9(a) rather than by resort to a multiplicity of separate actions. * * * Courts trying such *corporate actions* have adequate equitable power and procedural flexibility to protect all interests, even when the *corporate recovery* is not for the benefit of all stockholders but only for those who are nonenemies." (Emphasis supplied.) (Omissions noted by * * *.)

The events subsequent to this Court's decision have confirmed the wisdom of the procedural choice made by this Court. Thus, the Government's motion to dismiss on the basis of the Anti-Assignment Act was denied because the derivative corporate claim had never been assigned (*supra*, p. 5).

The Court of Appeals by stating that "a corporate action may be brought as one had been brought" apparently recognized that this Court had expressly sustained the right and duty of the corporation—and upon its refusal to act, the secondary right of the stockholders—to assert and enforce a corporate claim for partial recovery of the vested assets for the benefit of nonenemy stockholders. Then, inexplicably, it cavalierly dismissed it:

> "We are no longer concerned with the problem of a corporate recovery, for the corporation's suit has been dismissed" (App. C, p. 36).

But it was exactly because the corporation's suit for recovery of all the vested assets might be dismissed that this Court permitted petitioners to intervene to assert a

corporate claim for partial recovery. Now the Court of Appeals points to such dismissal—the very contingency which was the reason for this Court's allowance of the corporate claim for partial recovery—as its reason for disregarding that claim! That the Court of Appeals disregarded the fact that the order of dismissal of the corporation's suit, by its very terms, specifically left unaffected the claim of your petitioners, merely compounds its error. *Societe Internationale* v. *Brownell,* 225 F. 2d 532, 535, n. 8.

The Court of Appeals' misconstruction is most glaringly revealed in its paraphrase of this Court's ruling:

> "We thus conclude as did the Court, that each innocent nonenemy stockholder permitted to intervene in the corporate suit, has a 'severable interest in corporate assets seized by the Custodian. . . .' When his right is established and the extent of that severable interest is shown, the courts have 'adequate equitable power and procedural flexibility to protect all interests', *including that of the Government*" (App. C, p. 36). (Emphasis supplied.)

What this Court actually said was (343 U. S. at p. 161):

> Courts trying such corporate actions have adequate equitable power and procedural flexibility to protect all interests, *even when the corporate recovery is not for the benefit of all stockholders but only for those who are nonenemies.* (Emphasis supplied.)

The Court of Appeals literally substituted the *interest of the Government* for the *corporate recovery,* and thereby completely changed the meaning of this Court's ruling.

In 1951, the Court of Appeals had held that there was no such thing as a corporate claim for partial return of

vested assets proportionate to the nonenemy interest in the corporation. In 1952 this Court reversed, holding that there was such a corporate claim and that it could be asserted derivatively. In 1957, the Court of Appeals said that if there ever was such a corporate cause of action it was a vehicle which had somehow or other been derailed.

In 1952, this Court expressly rejected the Government's contention that if nonenemy stockholders are to be accorded any rights, they should be limited to their individual claims against the Custodian. In 1957, the Court of Appeals adopted the identical argument by the Government which this Court had rejected in 1952.

The decision of the Court of Appeals deprives the innocent holders of thousands of shares of rights which this Court held must be fully protected. It does so by refusing to recognize the procedural vehicle which the Court approved, and foresaw as necessary, for the enforcement of those rights. Under the corporate derivative claim filed by petitioners, all nonenemy stockholders are represented in the action and their rights protected thereby. This Court adverted to the flexible power inherent in the courts of equity to protect those rights, and specifically, to do so in the disposition of the eventual partial "corporate recovery". Under the decision of the Court of Appeals, only 41,683 shares are the subject of "individual claims" and the innocent holders of the balance of the approximately 112,000 common shares outstanding in the hands of a scattered public, are left without protection.[4]

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[4] The District Court relied upon the bar date order to achieve the same result. Such order is not only inconsistent with the corporate nature of petitioners' suit but is clearly no more than an interlocutory order subject to modification or change at any stage of the pro-

In 1952, this Court considered the issues presented to be of sufficient importance to determine upon certiorari. The reasons which prompted this Court's grant of certiorari and decision in 1952 are no less compelling today. The very protection of the interest of innocent stockholders in the American assets of their neutral corporation which this Court decreed is endangered by the decision of the Court of Appeals.

In the language of this Court:

> "[W]hen the Government seizes the assets of a corporation organized under the laws of a neutral country, the rights of innocent stockholders to an interest in the assets proportionate to their stockholdings must be fully protected" (~~156~~ 343 U. S. at pp. 159-160).

Innocent stockholders should "not be driven to accept their share of whatever price the Government may happen to get from a sale of these valuable assets". 343 U. S. at 161.

Unless certiorari is granted now and the Court of Appeals' decision is promptly reversed, no part of the 75% of the vested stock will be within the reach of the innocent stockholders covered by this corporate derivative claim.

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ceedings. *Oppenheimer* v. *F. J. Young & Co.* (C. A. 2, 1944), 144 F. 2d 387; *Fowkes* v. *Dravo Corp.* (D. C. E. D. Pa. 1946), 75 F. Supp. 514; *Tennessee Coal, Iron & R. Co.* v. *Muscoda Local 123* (N. D. Ala. 1946), 5 F. R. D. 174; *cf. Employers Liability Assur. Corp.* v. *Astoria Mahogany Co.* (C. A. 2d, 1925), 6 F. 2d 945; *People* v. *Hopkins* (C. A. 2d, 1927), 18 F. 2d 731. Therefore it cannot be such a final judgment in the action as is prerequisite to sale under Section 9(a) of the Trading With the Enemy Act. Hence, it was error for the District Court to base a denial of injunctive relief on such bar date order.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

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APPENDIX A.

Trading With the Enemy Act, as Amended.

SEC. 2. That the word "enemy," as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "enemy."

The words "ally of enemy," as used herein, shall be deemed to mean—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory

(including that occupied by the military and naval forces) of any nation which is an ally of a nation with which the United Sttes is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of such ally nation, or incorporated within any country other than the United States and doing business within sueh territory.

(b) The government of any nation which is an ally of a nation with which the United States is at war, or any political or municipal subdivision of such ally nation, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation which is an ally of a nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "ally of enemy."

The word "person," as used herein, shall be deemed to mean an individual, partnership, association, company, or other unincorporated body of individuals, or corporation or body politic.

The words "United States," as used herein, shall be deemed to mean all land and water, continental or insular, in any way within the jurisdiction of the United States or occupied by the military or naval forces thereof.

The words "the beginning of the war," as used herein, shall be deemed to mean midnight ending the day on which

Congress has declared or shall declare war or the existence of a state of war.

The words "end of the war," as used herein, shall be deemed to mean the date of proclamation of exchange of ratifications of the treaty of peace, unless the President shall, by proclamation, declare a prior date, in which case the date so proclaimed shall be deemed to be the "end of the war" within the meaning of this Act.

The words "bank or banks," as used herein, shall be deemed to mean and include national banks, State banks, trust companies, or other banks or banking associations doing business under the laws of the United States, or of any State of the United States.

The words "to trade," as used herein, shall be deemed to mean—

(a) Pay, satisfy, compromise, or give security for the payment or satisfaction of any debt or obligation.

(b) Draw, accept, pay, present for acceptance or payment or indorse any negotiable instrument or chose in action.

(c) Enter into, carry on, complete, or perform any contract, agreement, or obligation.

(d) Buy or sell, loan or extend credit, trade in, deal with, exchange, transmit, transfer, assign or otherwise dispose of or receive any form of property.

(e) To have any form of business or commercial communication or intercourse with.

SEC. 5. (b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or per-

son may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

(2) Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any rule, regulation, instruction, or direction issued hereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and no person shall be held liable in any court for or in respect to anything done or omitted in good faith in conncetion with the administration of, or in pursuance of and in reliance

on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder.

(3) As used in this subdivision the term "United States" means the United States and any place subject to the jurisdiction thereof: *Provided, however,* That the foregoing shall not be construed as a limitation upon the power of the President, which is hereby conferred, to prescribe from time to time, definitions, not inconsistent with the purposes of this subdivision, for any or all of the terms used in this subdivision. Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than $10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both. As used in this subdivision the term "person" means an individual, partnership, association, or corporation.

SEC. 6. That the President is authorized to appoint, prescribe the duties of, and fix the salary (not to exceed $5,000 per annum) of an official to be known as the Alien Property Custodian, who shall be empowered to receive all money and property in the United States due or belonging to an enemy, or ally of enemy, which may be paid, conveyed, transferred, assigned, or delivered to said custodian under the provisions of this Act; and to hold, administer, and account for the same under the general direction of the Presi-

dent and as provided in this Act. The alien property custodian shall give such bond or bonds, and in such form and amount, and with such security as the President shall prescribe. The President may further employ in the District of Columbia and elsewhere and fix the compensation of such clerks, attorneys, investigators, accountants, and other employees as he may find necessary for the due administration of the provisions of this Act: *Provided,* That such clerks, investigators, accountants, and other employees shall be appointed from lists of eligibles to be supplied by the Civil Service Commission and in accordance with the civil-service law: *Provided, further,* That the President shall cause a detailed report to be made to Congress on the first day of January of each year of all proceedings had under this Act during the year preceding. Such report shall contain a list of all persons appointed or employed, with the salary or compensation paid to each, and a statement of the different kinds of property taken into custody and the disposition made thereof.

SEC. 7. (c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefore, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall

be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

Any requirement made pursuant to this Act, or a duly certified copy thereof, may be filed, registered, or recorded in any office for the filing, registering, or recording of conveyances, transfers, or assignments of any such property or rights as may be covered by such requirement (including the proper office for filing, registering, or recording conveyances, transfers, or assignments of patents, copyrights, trade-marks, or any rights therein or any other rights); and if so filed, registered, or recorded shall impart the same notice and have the same force and effect as a duly executed conveyance, transfer, or assignment to the Alien Property Custodian so filed, registered, or recorded.

Whenever any such property shall consist of shares of stock or other beneficial interest in any corporation, association, or company or trust, it shall be the duty of the corporation, association, or company or trustee or trustees issuing such shares or any certificates or other instruments representing the same or any other beneficial interest to cancel upon its, his, or their books all shares of stock or other beneficial interest standing upon its, his, or their books in the name of any person or persons, or held for, on account of, or on behalf of, or for the benefit of any person or persons who shall have been determined by the President, after investigation, to be an enemy or ally of enemy and which shall have been required to be conveyed, trans-

ferred, assigned, or delivered to the Alien Property Custodian or seized by him, and in lieu thereof to issue certificates or other instruments for such shares or other beneficial interest to the Alien Property Custodian or otherwise, as the Alien Property Custodian shall require.

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

SEC. 9. (a) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor

by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall

be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

SEC. 33. No return may be made pursuant to section 9 or 32 unless notice of claim has been filed: (a) in the case of any property or interest acquired by the United States prior to December 18, 1941, by August 9, 1948; or (b) in the case of any property or interest acquired by the United States on or after December 18, 1941, not later than one year from February 9, 1954, or two years from the vesting of the property or interest in respect of which the claim is made, whichever is later; except that return may be made to successor organizations designated pursuant to Section 32(h) of this Appendix if notice of claim is filed before the expiration of one year from August 23, 1954. No suit pursuant to section 9 may be instituted after April 30, 1949, or after the expiration of two years from the date of the seizure by or vesting in the Alien Property Custodian, as the case may be, of the property or interest in respect of which relief is sought, whichever is later, but in computing such two years there shall be excluded any period during which there was pending a suit or claim for return pursuant to section 9 or 32(a) hereof.

Appendix A (Federal Rules of Civil Procedure, as Amended)

Federal Rules of Civil Procedure, as Amended.

Rule 24

Intervention

a. *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or of an officer thereof.

APPENDIX B.

Oral Ruling of the District Court.

THE COURT: (Pine, J.) Well, gentlemen, it appears from the papers before me that the Attorney General proposes to invite bids for the purchase from him of approximately 427,000 shares of Common A stock and 1,540,000 shares of Common B stock of G.A.F. and, if satisfactory bids are received, to sell the stock.

The Attorney General is the record holder of approximately 91 percent of the outstanding Common A shares and 100 percent of the outstanding Common B shares. The bids will be opened April 23, 1957. That is little more than a month from today. Injunctions have been sought by the plaintiff Interhandel and by certain plaintiff intervenors, generally referred to as the Kaufman group and the Attenhofer group, to enjoin the defendant from proceeding with the proposed sale. I have no doubt that, either way I decide, an appeal will be taken to the Court of Appeals and an effort will be made to take the matter to the Supreme Court.

This view is based upon past experience with this protracted and extensively litigated lawsuit. It is therefore necessary, in the interest of justice, that I act as promptly as possible in order that these appeals may be taken, heard, and disposed of, if possible, prior to the date of the opening of the bids. The motions and briefs were sub-
754 mitted to me as they were filed and I have had an opportunity to read and consider them prior to this hearing and I have had the advantage of the extensive oral arguments and I am ready to rule. I read the briefs

in advance in order that I might be able to act promptly and rule promptly.

The plaintiff intervenors' rights are limited by the Kaufman decision to an interest in the assets proportionate to their stockholdings. It appears that they represent only approximately 15 percent of the stockholdings of Interhandel. Under the bar date order, no stockholders other than those who intervene are permitted to receive any benefit from any judgment. Defendant plans to sell only 75 percent of the Interhandel vested stock of G.A.F. whereas the maximum recovery by the intervenors cannot exceed 15 percent of this Interhandel claimed G. A. F. stock. Defendant is therefore proposing to sell stock, an interest in which under no circumstances could be claimed by the plaintiff intervenors, and I reach this conclusion as to his right to sell on either the individual theory or the derivative theory.

I cannot subscribe to the theory of the intervening plaintiffs that they are entitled to a fractional interest in all the stock, or to the basis of their claim for all the vested property less only so much as is proportionate to the enemy stock interest. That theory might give the plaintiff intervenors something to which they are not
755 entitled, namely, an interest in the nonenemy stock which, for some reason, has not been claimed. While the proportionate amount ultimately to be returned to the intervening plaintiffs has not been determined and will not be determined until each claim has been finally decided, the maximum amount that can be recovered has been determined by the claims filed before the bar date and that is

amply secured by the retention by defendants of the 25 percent not offered for sale.

When I spoke of maintaining the status quo in my opinion in relation to the injunction to forbid the reclassification of the stock, of course, as that opinion will show, it related to the status quo or integrity of each and every share of stock including those in which the plaintiff intervenors claimed an interest. In my opinion, that interest would have been injured by the total reclassification. No such situation exists here as the proposed sale is only to sell that stock in which intervening petitioners have no interest.

Now, so far as the motion for an injunction by Interhandel is concerned, I am of the opinion that it is not entitled to an injunction from this Court because final judgment has been entered herein and plaintiff lacks standing; and, also, this Court has no jurisdiction to issue it.

In the injunction proceeding last fall for
756 reclassification of the stock, it was not necessary to decide this point because the full relief sought was given at the instance of the plaintiff intervenors. Here it becomes necessary to decide the point because the plaintiff intervenors, as I have stated, are not entitled to the relief sought and I decide that Interhandel is not entitled to an injunction from this Court on the present record.

The pendency of a counter claim has no application to rights given under Section 9 (a). Counsel will submit, with all due speed, findings and conclusions in accordance herewith.

APPENDIX C.

Opinion of the United States Court of Appeals for the District of Columbia Circuit.

Before WILBUR K. MILLER, FAHY and DANAHER, *Circuit Judges.*

DANAHER, *Circuit Judge*: These are consolidated appeals lodged by two groups of intervenors in the corporate action commenced in 1948 by Societe Internationale, a Swiss corporation, formerly called I. G. Chemie, but now commonly known as Interhandel. Commencing in February 1942, the Attorney General or his predecessors issued a series of vesting orders by which, under the Trading with the Enemy Act,[1] the Government had seized some 93% of the stock of General Aniline & Film Corporation (hereinafter called GAF), said to have been the property of foreign nationals or owned by or held for I. G. Farbenindustrie A.G. of Germany. Background facts in substantial measure may be gleaned from our opinion in *Societe Internationale, Etc.* v. *Brownell.*[2] In the latter action, the Kaufman group was permitted to intervene,[3] after which the Attenhofer group was also allowed[4] intervention over the opposition of the Kaufman group. In all, some 2,488 stockholders intervened; the complaints of 720 were dismissed; and the remaining 1,768 stockholders own

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[1] 40 STAT. 411, as amended, 50 U.S.C. App. §§ 1-40 (1952).

[2] 96 U.S. App. D.C. 232, 225 F. 2d 532 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 937 (1956); and see Societe Internationale, Etc. v. Brownell, Nos. 13460 and 13527 (D.C. Cir. Apr. 11, 1957).

[3] Kaufman v. Societe Internationale, 343 U.S. 156 (1952).

[4] Following the District Court's order, motion for leave to file petition for a writ of mandamus was denied, Kaufman v. Pine, 344 U.S. 891 (1952).

a total of 41,683 shares found by the District Court to represent 15.439% of the total outstanding stock of I. G. Chemie at the date of vesting. When the Attorney General announced on February 21, 1957, a proposed public sale of 75% of the shares of the vested GAF stock, appellants sought to enjoin the sale of any of the vested shares. Judge Pine denied motions for an injunction, and after appellants had moved jointly for rehearing, the District Court on March 15, 1957, made findings of fact and conclusions of law with respect to both motions for injunction and joint motion for rehearing. The same day two orders were entered denying all motions and these appeals followed.

Appellants in the Kaufman group claim, in effect, that theirs is a corporate derivative action which entitles them ultimately to the return of "the innocent proportion" of the vested assets and that such portion may well exceed 80% of the vested property.

Appellants in the Attenhofer group claim that the District Judge misconstrued the decision of the Court in *Kaufman* v. *Société Internationale*, erred in holding that the various appellants represent only themselves and not all non-enemy stockholders of Interhandel, and further, briefly, erred in holding that retention of 25% of the vested stock is sufficient in view of the respective claims.

Both groups insist that § 9(a) of the Trading with the Enemy Act[5] requires that *all* vested property here in-

[5] *Supra* note 1, 50 U.S.C. App. § 9(a).

volved "shall be retained" by the Custodian once suit is brought and until final judgment. Without our particularizing as to further details of the grounds upon which reversal is sought, we turn to the *Kaufman* case which we deem controlling.

The Court pointed out, as it supplied the background upon which intervention was permitted, that petitioners "admitted the right of the Custodian to retain an interest in the seized assets proportional to the stock ownership of enemy stockholders."[6] Thus the question was, said Mr. Justice Black, "What *part* of the assets of a corporation organized under the laws of a neutral country may the Custodian retain where *part* of the corporate stock is owned by enemies, *part* by American citizens, and *part* by nonenemy aliens?"[7]

The answer, in paraphrase, ran to the effect that all corporate assets may be seized, whereupon consideration must be given to the plight of innocent stockholders whose innocent interests are not required to be confiscated. Accordingly,

> "Our holding is that when the Government seizes assets of a corporation organized under the laws of a neutral country, the rights of innocent stockholders to an interest in the assets proportionate to their stock holdings must be fully protected. This holding is not based on any technical concept of derivative rights appropriate to the law of corporations. It is based on the Act which enables one not an enemy

[6] 343 U.S. at 158.

[7] *Ibid.* (Emphasis supplied.)

as defined in § 2 to recover any interest, right or title which he has in the property vested. The innocent *stockholder* may not have title to corporate assets, but *he* does have an interest which Congress has indicated should not be confiscated merely because some others who have like interests are enemies."[8]

The Kaufman petitioners there had attacked the position of the corporation, Interhandel, which sought return of "all its assets" on the theory they would suffer if "whatever return is obtained must be divided among enemy and nonenemy shareholders in proportion to their stock holdings."[9]

The Government, agreeing with the position of the corporate management, argued that if nonenemy stockholders were to be given any standing, they should be limited to individual suits for money judgments against the Custodian. "Petitioners claim a proportional right or interest in the specific assets of Interhandel . . . ."[10] Having so taken account of the respective arguments, and permitting maintenance of the corporate action, the Court then cut through the "corporate veil" and allowed—*in that corporate action*—the "nonenemy stockholder *in his own right* [to] . . . assert *his* nonenemy character in order to protect *his own interest* from the enemy taint caused by other stockholders."[11]

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[8] 343 U.S. at 159-60. (Emphasis supplied.)

[9] *Id.* at 160.

[10] *Id.* at 161.

[11] *Ibid.* (Emphasis supplied.)

Appendix C (Opinion of the United States Court of Appeals for the District of Columbia Circuit)

To us the Court is speaking clearly, succinctly and positively. To avoid multiplicity of actions by thousands of individual shareholders, a corporate action may be brought as one had been brought. In that action an individual stockholder might intervene, and on the basis of his own entitlement, his individual right might be asserted. If he could not prove his right, that ended the matter, but at least he might intervene to show his own nonenemy character. Thus, the petitioners, represented then by the Kaufman group, were allowed to intervene over the strong dissent which saw the majority permitting a friendly stockholder to withdraw his contribution to the funds of the corporation.[12]

We are no longer concerned with the problem of a corporate recovery, for the corporation's suit has been dismissed.[13] We thus conclude as did the Court, that each innocent nonenemy stockholder[14] permitted to intervene in the corporate suit, has a "severable interest in corporate assets seized by the Custodian . . . ."[15] When his right is established and the extent of that severable interest is shown, the courts have "adequate equitable power and procedural flexibility to protect all interests,"[16] including that of the Government.

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[12] 343 U.S. at 168

[13] *Supra* note 2.

[14] Fritz von Opel v. Brownell, —— U.S. App. D.C. ——, —— F. 2d ——, No. 13265 (D.C. Cir. May 23, 1957).

[15] 343 U.S. at 161.

[16] *Ibid.*

Section 9(a) of the Act provides that when the court in an equity action finds an individual claimant's interest has been established, it shall order the "payment, conveyance, transfer, assignment, or delivery . . . of the money or other property . . . or the interest therein to which the court shall determine said claimant is entitled;" not the property or interest therein of some *other* claimant, or even of all claimants similarly situated, but of that to which "*said claimant*" is entitled, as established in the suit he instituted. "[S]uch money or property" commanded to be retained pending final judgment or decree can only be that to which claim is made by the claimant authorized by § 9 to institute the action reflecting his own "severable" right.

It follows that the intervenors here were not entitled to enjoin the sale of assets aggregating in value some $100,000,000 pending ascertainment (1) of their right and (2) the extent of their respective interests following the establishment of their severable rights.

But, it is argued, the District Court in any event erred in finding that the interests of the intervening groups did not exceed 25% of the vested assets, indeed that it was error to find such interests amounted to only 15.439% of the total outstanding stock of I. G. Chemie at the date of vesting. We cannot say the District Court abused its discretion or otherwise erred in retaining 25% of the vested assets to answer to such claims and interests as shall be established.

Affirmed.

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JOHN T. FEY, Clerk

No. 299

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

ERNEST ATTENHOFER, ET AL., *Petitioners,*

v.

HERBERT BROWNELL, JR., Attorney General of the United States, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

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OCTOBER TERM, 1957

No.

ERNEST ATTENHOFER, ET AL., *Petitioners,*

v.

HERBERT BROWNELL, JR., Attorney General of the United States, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Ernest Attenhofer, et al., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above cause on June 20, 1957.

OPINIONS BELOW

The oral opinions of the District Court on the motion for injunction and on the motion for rehearing are unreported. Both are reprinted as Appendix B. The

opinion of the Court of Appeals, which is reprinted hereinafter as Appendix C, is reported at F. 2d

JURISDICTION

The judgment of the Court of Appeals (Appendix C, *infra*. p. 6a.) was entered on June 20, 1957. The jurisdiction of this Court is invoked under 62 Stat. 928, 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Did the courts below misconstrue and misapply the decision of this Court in *Kaufman* v. *Societe Internationale,* 343 U.S. 156, when they refused to permit petitioners (and other intervening stockholders) to establish the non-enemy ownership of a neutral corporation as of the time of the vesting of its property?

2. Section 9(a) of the Trading With the Enemy Act requires that when suit is instituted to recover an interest in vested property, the Custodian must *retain* the property in his custody until that suit is terminated. Where such a suit is pending and the interest of the petitioners in the vested property has not been adjudicated, may the Custodian nevertheless sell 75% of the vested property in violation of his statutory duty?

3. May a district court, in a suit under Section 9(a) of the Trading With the Enemy Act, limit the maximum recovery of plaintiff stockholders without a trial on the merits by imposing an interlocutory "bar date" and thereafter give said interlocutory "bar date" the effect of a final order so as to permit the Custodian to evade the retention provisions of Section 9(a)?

4. Did the District Court properly compute the interest of petitioners in the vested property in determining that such interest (together with that of other intervenors) did not exceed 25% of said property?

STATUTES INVOLVED

The pertinent provisions of the Trading With the Enemy Act of 1917, 40 Stat. 411, as amended, 50 U.S.C. App. § 9, are set forth in Appendix A (p. 1a herein).

STATEMENT

Beginning on February 16, 1942, respondent's predecessors issued a series of orders which vested the American assets of a Swiss corporation now known as Interhandel. As a result, respondent's predecessors acquired approximately 93% of the stock of General Aniline & Film Corporation, a Delaware corporation, hereinafter called GAF, consisting of 455,624 shares of common A stock and 2,050,000 shares of common B stock, valued in excess of $100,000,000, plus certain sums of cash in United States banks.[1] The Attorney General also, by certain other orders, vested from other GAF stockholders 20,185 shares of common A stock (R. 202, 271), and he acquired an addi-

[1] The stock of GAF was vested on February 16, 1942, by the Secretary of the Treasury. V.O. February 16, 1942, 7 F.R. 1046. This stock was vested again on April 24, 1942, by the Alien Property Custodian following his appointment. V.O. No. 5, April 24, 1942, 7 F.R. 3148. An additional group of 176 shares was vested on Februar, 15, 1943. Other vesting orders were issued in 1946 but these vested sums of money only. V.O. 6718, June 24, 1946, 11 F.R. 7643; Supp. V.O. No. 6767, June 26, 1946, 11 F.R. 7733; Supp. V.O. No. 6768, June 26; 1946, 11 F.R. 7733; Supp. V.O. No. 6769, June 26, 1946, 11 F.R. 7734; Supp. V.O. 7874, October 14, 1946, 11 F.R. 13887.

tional 65,085 shares of common A stock in GAF in exchange for all the stock in General Dyestuff Corporation, a corporation which he had vested from others not involved in this suit. (R. 271)

On October 21, 1948, Interhandel filed Civil Action No. 4360-48 (the suit in which the present appeal arose) in the United States District Court for the District of Columbia to recover the stock of GAF and other property which had been taken from it. (R. 6, 7)

On March 14, 1950, Eric G. Kaufman and members of his family sought to intervene in that suit alleging that Interhandel was entitled to the return of that portion of the vested property which is proportionate to the interest in the corporation held by non-enemies *even if* the corporation were ultimately determined to be an enemy or enemy tainted. The District Court denied Kaufman's motion to intervene, the Court of Appeals affirmed, 88 U.S. App. D.C. 296, 188 F. 2d 1017, but this Court reversed, *Kaufman* v. *Societe Internationale,* 343 U.S. 156, and directed that the Kaufman complaint in intervention be filed.

On June 16, 1952, petitioners Ernest Attenhofer, et al., also stockholders in Interhandel, sought leave to intervene (R. 27), which was granted. (R. 63-72, 73, 110)

On April 16, 1953, respondent filed a motion to require all shareholders of interhandel intending to intervene to enter this litigation as parties. This motion was opposed by petitioners but was granted by the Special Master pursuant to an opinion and an order filed on July 21, 1953. (R. 112, 116) In this order, hereinafter referred to as the "bar date" order,

the Special Master required that all shareholders of Interhandel who desired to intervene should do so on or before January 1, 1954, failing which they were thereafter to be barred from all benefits of any judgment which might be obtained in this action.

Petitioners, by motion in the District Court, challenged the Special Master's ruling. (R. 122) On December 16, 1953, a full 31 months before the suit by Interhandel seeking return of *all* the vested property was finally dismissed, the District Court (Pine, J.), in order to accommodate respondent's desire to invoke discovery procedures, confirmed the "bar date" order but extended the cut-off date to March 31, 1954. (R. 123) This order was interlocutory in all respects.

Although some 2,500 individual shareholders of Interhandel owning some 55,000 fully-paid and 1,900 half-paid shares of stock intervened, numerous others failed or refused to come in, apparently because the expense and effort of such interventions would be wasted if the corporation won its suit.[2]

Meanwhile, another district judge (Laws, C. J.) was conducting proceedings relating to the suit of plaintiff Interhandel. On December 21, 1953, he entered an order dismissing Interhandel's complaint with prejudice for failure (inability) to comply with the terms of a discovery order but reserved the right to intervening shareholders (petitioners and others) to pursue their secondary cause of action. *Societe Internationale* v. *McGranery,* 111 F. Supp. 435, 448. The Court of Appeals affirmed the dismissal of Interhandel's complaint but granted the corporation an

[2] The corporation's suit was finally dismissed by the District Court on August 3, 1956.

additional period of 6 months within which to comply with the District Court's discovery order. 96 U.S. App. D.C. 232, 225 F. 2d 532.

On August 31, 1956, the District Court (Laws, C. J.) concluded that Interhandel had not complied with the order for the production of documents and dismissed the complaint with prejudice. *Societe Internationale* v. *Brownell,* U.S. App. D.C. , 243 F. 2d 254.

In September of 1956, GAF announced plans to reorganize its capital structure and respondent announced his intention of voting the stock vested from Interhandel (constituting approximately 93% of the outstanding stock) in favor of said plan. (R. 178, 181) Petitioners and others moved to enjoin the proposed recapitalization. The District Court (Pine, J.) issued findings of fact, conclusions of law and an order (R. 176) restraining respondent and his agents from voting for or otherwise proceeding with a proposed plan of recapitalization of the stock of GAF on the ground that the proposed recapitalization violated the retention provisions of Section 9(a) of the Trading With the Enemy Act. Respondent appealed from this injunctive order and said appeal is presently pending (but has not been argued) in the Court of Appeals.

Thereafter, in a prospectus filed with the Securities & Exchange Commission dated February 21, 1957, respondent announced a proposed public sale of 75% of the shares of the vested GAF stock. (R. 203) Petitioners and others, i.e., Eric G. Kaufman, et al., promptly moved to enjoin this proposed sale. (R. 201) Respondent opposed the issuance of an injunction, contending that petitioners and the other intervenors

represented only some 15% of the stock of Interhandel and that since each stockholder's recovery was limited to an interest in the vested property proportionate to his stockholdings, respondent was free to sell the remaining 85% of the vested property free from the duty imposed by Section 9(a) to hold the property intact pending litigation. The District Court (Pine, J.) denied the motion for injunction as well as a joint motion for rehearing filed by petitioners and the Kaufman intervenors. (R. 263, 275) The Court of Appeals consolidated petitioners' appeal with that of the Kaufman intervenors and affirmed the District Court's refusal to enjoin the sale. Appendix C, *infra*, p. 6a.

REASONS FOR GRANTING THE WRIT

(a) The courts below erroneously interpreted and misapplied the decision of this Court in *Kaufman* v. *Societe Internationale*, 343 U.S. 156. In that case, Kaufman filed a motion for leave to intervene in the suit brought by Interhandel to recover its vested property. He alleged that he and other non-enemy stockholders had interests in the corporate assets which it was Interhandel's duty to protect, that the dominant enemy group which had charge of the suit would not press the corporate claim adequately to protect the claims of innocent shareholders and that his group had a right, in a derivative capacity, to intervene under Rule 24 (a) of the Federal Rules of Civil Procedure on behalf of himself and all other non-enemy stockholders similarly situated.

This Court reversed a denial of Kaufman's right to intervene. Mr. Justice Black, speaking for the Court, pointed out that Interhandel is a neutral corporation

organized in Switzerland, and that while the 1941 amendment of the Trading With the Enemy Act permits the piercing of the corporate veil for the purpose of finding enemy taint, the amended Act does not contemplate appropriation of friendly or neutral assets.

This Court noted that a mere narration of the allegations showed that Kaufman's fears were by no means fanciful. Although Kaufman, in order to play safe, had filed a separate suit in a federal district court, the Court thought that questions involved in disputes like this can be more appropriately resolved in "corporate actions" authorized by Section 9(a) than by resort to a multiplicity of separate actions. Mr. Justice Black stated that courts trying such "corporate actions" have adequate equitable power and procedural flexibility to protect all interests, even when the corporate recovery is not for the benefit of all stockholders but only for those who are non-enemies. The allegations thus brought the claim of intervention squarely within Rule 24(a)(2) of the Federal Rules of Civil Procedure.

As pointed out above, Kaufman's complaint was derivative in character, seeking to enforce rights existing in the corporation's stockholders to recover such part of the vested assets as were proportionate to the non-enemy stock ownership of plaintiff Interhandel. This Court was well aware of the Kaufman allegation that approximately 10.9% of the stock of Interhandel was held by enemies and that the other 89% was presumably held by non-enemies. (R. 8, 10, 12) This Court visualized very clearly that the percentage of the non-enemy ownership of Interhandel could be established by Kaufman on behalf of all non-

enemy shareholders and that thereafter the shareholders might come forward to establish their non-enemy status and claim their proportionate share of the recovery. This Court stated that the District Court possessed adequate equitable power and procedural flexibility to protect all interests in such an event, even that of the Government.

However as will be discussed more fully hereafter, the courts below refused to permit Kaufman and these petitioners to establish Interhandel's title to the vested property and the percentage of non-enemy ownership of its stock but rather, prematurely and without a trial on the merits, permitted a procedural, interlocutory order to cut off their rights and thus adjudicate their claim. This Court's holding in *Kaufman*, while not based on any technical concept of derivative rights appropriate to the law of corporations, stood squarely on the right of each non-enemy shareholder "to recover any interest, right or title which he has in the property vested" (343 U.S. at 160) and contemplated that the District Court would justly exercise its "adequate equitable power and procedural flexibility to protect all interests . . . ." (343 U.S. at 161)

The courts below have thus completely frustrated the very purpose of this Court's decision—to protect the rights of innocent stockholders until the controversy over both Interhandel's status and the proportionate interest of the stockholders is finally settled.

(b) Section 9(a) of the Trading With the Enemy Act[8] provides that once suit is instituted to recover-

[8] The Trading With the Enemy Act has required almost constant interpretation and supervision by this Court. From the time of

an interest in vested property, the Alien Property Custodian is under a duty to *retain* the property in his custody until the termination of the litigation by final judgment or otherwise. Such a provision is necessary to give the arbitrary vesting power constitutional validity. See *e.g. Stoehr* v. *Wallace*, 255 U.S. 239, 245-246.

In this case, litigation is pending in which petitioners are asserting *an interest* (the amount of which is to be established at the trial) in the vested property. However, the Custodian seeks to avoid the statutory requirement that he retain the property by invoking a procedural ruling, entirely interlocutory in nature, which he contends has determined and limited the rights of petitioners to a total recovery of less than 25% of the vested property *in spite of the fact that petitioners have not had a trial to determine what their interest is.* If allowed to proceed with his attempt to sell 75% of the vested property under these circumstances, the Custodian will have succeeded in avoiding the very provisions of the Act which give it constitutionality.

Central Trust Co. v. *Garvan*, in 1921, 254 U.S. 554, through *Benn, Meyer & Co.* v. *Miller*, 266 U.S. 457; *Markham* v. *Cabell*, 326 U.S. 404; *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, to *Kaufman* v. *Societe Internationale*, 343 U.S. 156, and the second *Uebersee* case in 1952, 343 U.S. 205, this Court has found it necessary to guide lower courts to a proper construction. That this has been so is not surprising for, as Mr. Justice Douglas stated when describing this statute in the first *Uebersee* case, *supra:*

> "We are dealing with hasty legislation which Congress did not stop to perfect as an integrated whole. Our task is to give all of it—1917 to 1941—the most harmonious, comprehensive meaning possible."

This result is reached as follows: On December 16, 1953, the District Court required all shareholders of Interhandel to enter their appearances as parties within less than four months from that date or be *forever barred* from any and all benefits arising out of any judgment rendered in the suit. This order was not only entirely interlocutory[5] (and thus not appealable), but was so premature as to border on the fantastic. Yet some three years later, the District Court gave to this "bar date" order the full effect of a *final judgment* on the merits. It held that the Custodian need not retain the vested property (as required by Section 9(a)) because (1) the "bar date" order cut off all stockholders except those now in the case, and (2) the stock interest of those now in the case amounts to less than the number of shares to be disposed of by the Custodian. The result is that 75% of the vested stock will be finally disposed of, passing forever out of the control of present stockholders, before any review is had of the "bar date" order used to release the stock.

"Bar date" orders are well known to the law and are frequently entered in certain types of actions, such

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[4] This "bar date" order was originally suggested not by the respondent but by the Special Master. Respondent sought to serve interrogatories on shareholders of Interhandel who were not parties. The Special Master held that no authority existed for this but suggested that if respondent desired to make application he would enter an order directing all shareholders to intervene. Respondent's basic purpose, therefore, was to utilize discovery procedures—not to limit prospective claimants. (R. 98-109)

[5] It neither disposed of nor determined the merits of petitioners' claim in the District Court. It did not adjudicate the ultimate rights of the parties or put the case out of court. It did not purport to limit the shares of recovery which petitioners were claiming. (R. 116-124)

as Fair Labor Standards Act cases and proceedings on creditors' bills, where they are properly invoked. In such cases, suit is normally filed by one member of a class to enforce the liability of a defendant to the members of the class. Intervention is normally *allowed* by additional members of the class only after the rights of the class to a recovery are fixed so that the members thereof may establish their share in such recovery. See Commentary on *Intervention in Class Actions*, 5 Federal Rules Services 831, 883. Cf., *e.g.*, *System Federation No. 91* v. *Reed* (CA 5) 180 F. 2d 991, where intervention was permitted after the entry of judgment "to secure the benefits" of the decree, and *Dickinson* v. *Petroleum Conv. Corp.*, 338 U.S. 507, where an interlocutory judgment was entered on the class claim and provision was made for a "concourse" to determine the claims of the individual members and to apportion the recovery as between them.

But such "bar dates" must be reasonable and timely—and the timeliness of such orders must be determined *not merely by a desire to reduce the number of litigants* or by the mere lapse of time, but by the test of prejudice or unfairness to the interests of the opposing party arising within the period between the filing of the complaint and the time fixed for the cut-off date. *Tennessee Coal, Iron & Railroad* v. *Muscoda Local 123*, 5 F.R.D. 174.

Here, the "bar date" was effective as of March 31, 1954. The complaint of plaintiff Interhandel was not finally dismissed by the District Court until over two years later, on August 3, 1956. Since petitioners' rights were admittedly "secondary" and would arise *only if* Interhandel lost its suit, petitioners' case could

not possibly have been tried until Interhandel's rights had been finally determined. As a matter of fact, on the date of the filing of the instant petition (July 19, 1957) petitioners' case has not yet been set for trial—some 39 months after the "bar date". A mere narration of these facts shows that the "bar date" was grossly untimely and premature as a matter of law.

Yet, it was this very "bar date" which the District Court permitted the Custodian to use as a shield to avoid the *retention* requirement of § 9(a). And the Court of Appeals, in basing its decision on the District Court's computation[6] that owners of only some 15% of Interhandel stock had intervened in response to the "bar date" and that all other shareholders were barred, narrowly construed § 9(a) as requiring the Custodian to retain only an amount of the vested property equivalent to the 15% of stock that had intervened, thus effectively preventing a trial on the issue of the amount petitioners are entitled to and reading the retention requirement of § 9(a) completely out of the statute.

(c) It appears from the pleadings in this case that some 10.9% of the shares of Interhandel were owned by German citizens. (R. 8, 10, 12) The basic questions to be determined at the trial of petitioners' suit are (1) whether Interhandel actually had title to the vested property, and (2) if it did, the percentage of enemy ownership of Interhandel on the date of vesting.

Where, as here, the determination of multiple and complicated issues is dependent upon the resolution

[6] That this computation was erroneous is pointed out at pp. 17-18, *infra*.

of one or two preliminary questions, this Court has said that orderly procedure requires the resolution of the preliminary questions first. In *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.*, 289 U.S. 689, 693, Mr. Justice Cardozo stated for the Court:

> "There are times when a suit is triable in separate parts, one affecting the right or liability, and the other affecting the measure of recovery. In suits of that order a discovery as to damages will commonly be postponed until the right or liability has been established or declared. . . . As a general thing it will be useless to decree it any earlier, and may even be oppressive. 'The principle of judicial parsimony' (L. Hand, J., in *Pressed Steel Car Co.* v. *Union Pacific R. Co.*, *supra* [D.C., 240 F. 135], if nothing more, condemns a useless remedy. This division of the trial into stages or instalments will happen oftenest in suits in equity, though it is now unknown in actions at law where a jury has been waived. In equity it is common practice. Thus, a suit to establish a partnership or to restrain the infringement of a patent culminates, if successful, in an interlocutory decree which will be followed by an accounting and a discovery of documents. In these and like cases, the accounts will not be probed until the right has been adjudged."

Numerous cases have followed this principle of staying proceedings for the determination of subservient questions until the resolution of the dominant one. *E.g.*, *Full-Vue Co.* v. *American Optical Co.*, 11 F.R.D. 185; *Zenith Radio Corp.* v. *Dicto Products Co.*, 6 F.R.D. 597; *Ball* v. *Paramount Pictures, Inc.*, 4 F.R.D. 194; *Momand* v. *Paramount Pictures Distributing Co.*, 36 F. Supp. 568; *Stewart-Warner Corp.* v. *Staley*, 2 F.R.D. 199; *Carter Printers* v. *Cannon*, 2 F.R.D. 174.

In *Pentland* v. *Dravo Corp.*, 3 Cir., 1945, 152 F. 2d 851, the court, in a Fair Labor Standards Act case, refused to compel intervention even after the case had been pending as long as six months, where there was no imminence of a trial.

In *York* v. *Guaranty Trust Co.*, 2 Cir., 1944, 143 F. 2d 503, reversed on other grounds, 326 U.S. 99, the court applied a rule which is singularly apposite here. That case involved a suit by a note holder on behalf of herself and other note holders similarly situated, to recover money allegedly due as the result of a breach of a fiduciary relation. An effort was made to make the other note holders named parties plaintiff. As here, however, their rights to recover depended upon a primary question. In *York,* the question was whether there had been a breach of trust. The Second Circuit felt that intervention should be open to the note holders until after the determination of the primary question. Until such time, it was not necessary for them to make their claims.

Interhandel has literally thousands of stockholders, the vast majority of whom reside in Switzerland and nearby countries. Presumably other neutral corporations whose assets have been or in the future will be vested will likewise have substantial numbers of shareholders. To permit the lower federal courts to establish the judicial policy of requiring all shareholders to enter suits under Section 9(a) prior to the time when basic preliminary questions will have been determined would be to impose an enormous and an unnecessary burden on our already congested federal trial courts. On the other hand, to permit traditional stockholders' suits to be brought by a small representative group which will be able to carry on litigation of the basic

preliminary questions will effectuate the purposes of the statute and, in addition, makes judicial good sense.

An additional important reason exists why petitioners' derivative theory should be accorded full recognition. In its answer to petitioners' complaint, respondent has pleaded the technical defense of the statute of limitations (31 U.S.C. 203), which if eventually allowed by the Court, might have the effect of destroying the rights of the non-enemy stockholders, since none of them prior to the opinion of this Court in *Kaufman* v. *Societe Internationale* (with the exception of the Kaufman family itself) had filed administrative claims or suits.[7]

It was well known to this Court when it decided *Kaufman* v. *Societe Internationale* that the time fixed by the letter of the statute for filing administrative claims and suits had expired. We therefore cannot assume that this Court when it construed the Trading With the Enemy Act as affording innocent stockholders of neutral corporations protection of their rights in the seized assets intended to give an empty right which could not be enforced because of a statutory prohibition. Such a construction of this Court's opinion would indicate that the Court was only giving lip service to the rights of non-enemy stockholders which were being judicially recognized for the first time. It would appear, however, that such an unwarranted construction of this Court's opinion was adopted by the Court of Appeals.

(d) Petitioners' stockholdings, when correctly computed, will be more than the 25% of the total capital

[7] 50 U.S.C. App. § 33, 60 Stat. 925, as amended.

of Interhandel which the Custodian will retain under the order of the District Court.

The proportionate interests of the intervening stockholders should be determined on the basis of the capitalization of Interhandel at the time the rights of the intervening stockholders are finally adjudicated, rather than at the time of vesting. The common stock capitalization of Interhandel has been reduced from 250,000 to 193,416 since the date of vesting (the preferred stock remaining the same), thereby materially increasing the proportionate interest of each common share in the assets.

Since the preferred stock is limited and preferred in liquidation to 110% of par, while the common is unlimited, the trial court improperly equated the preferred and common stock on the basis of their relative par values. (Finding No. 17, R. 273) Furthermore, the trial court found that the preferred stock's prior claim in liquidation can be fully satisfied from non-vested assets of Interhandel. (Finding No. 21, c. 274) Therefore, the entire equity in the vested assets should be treated as being in the common stockholders.

The 81,400 shares of Interhandel which its subsidiary, GAF, distributed to the respondent as dividends on the Interhandel claimed stock subsequent to the time of vesting should have been disregarded by the trial court, as well recognized principles of accounting direct,[8] or added proportionately to the intervenors' shares for the purpose of determining the intervenors' proportionate interest in Interhandel. This is so because the intervenors, if successful, will be entitled

[8] See *Paton's Accountants' Handbook*, (3rd Edition, 1947) at page 1099.

not only to their proportionate interest in the vested assets but also to their proportionate interest in any increment on the vested assets.

If the foregoing errors are corrected, it will be seen that the interest of the intervenors in the seized assets is not 15.439%, as the trial court found, but 37.2%. The latter percentage is the ratio which the intervenors' 41,683 shares bear to the outstanding common shares (193,416) reduced by the dividend shares (81,400), or the ratio of 41,683/112,016. The same result is reached if the intervenors' 37.2% interest in the 81,400 dividend shares, or 30,290 shares, is added to their 41,683 shares (making 71,973 shares) and that total is divided by the outstanding 193,416 common shares. Even if the court should reject intervenors' contention respecting the preferred stock (second error above), the denominator becomes 213,416 and the percentage is still over 25%—namely, 33.7%.

The only proper solution for the determination of the non-enemy interest in Interhandel would be to treat the non-allocated shares as enemy or non-enemy owned in the same ratio as the remaining stock of the parent is owned (or, what amounts to the same thing, eliminate from the base of the equation such part of the total block as is attributable to the shares vested by the Custodian, namely 81,400 shares). Thus, even if the court rejects petitioners' contention respecting the preferred stock, the ratio becomes 41,683/132,016, or 31.5%.

In either case, whether by allocation among the enemy and non-enemy interest or by the elimination principle, the entire interest held by the Custodian will be properly attributed to the enemy and non-enemy interest.

We, therefore, respectfully submit that, on a correct computation, the interest of the intervening stockholders in the seized assets is in excess of 25%. This having been demonstrated, it necessarily follows that the Courts below erred in holding that petitioners were not entitled to the requested injunction.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: July 19, 1957.